Date of Issuance
October 30, 2012

Decision 12-10-045 October 25, 2012

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Updated and Corrected Application of GREAT OAKS WATER CO. (U162W) for an Order Authorizing an Increase in Rates Charged for Water Service, increasing the revenue requirement by $1,846,100 or 14.94% in 2010, by $254,425 or 1.79% in 2011, and by $165,822 or 1.14% in 2012.	Application 09-09-001 (Filed September 3, 2009) (Updated and corrected caption filed November 12, 2009)

ORDER GRANTING LIMITED REHEARING AND MODIFYING DECISION (D.) 10-11-034, AND DENYING REHEARING OF THE DECISION, AS MODIFIED, AS TO ALL OTHER ISSUES

I. SUMMARY

This decision addresses the application for rehearing of Decision (D.) 10-11-034 (or "Decision") filed by Great Oaks Water Company ("Great Oaks"). D.10-11-034 resolved the general rate case ("GRC") application of Great Oaks for the test year July 1, 2010 to June 30, 2011 and the following two escalation years.

Great Oaks filed a timely application for rehearing of D.10-11-034 raising numerous challenges. The rehearing application alleges the following: (1) The Commission violated Great Oaks' equal protection and due process rights, and D.10-11-034 resulted in confiscatory rates, because the Decision unlawfully deviates from Commission policy and past decisions that authorize full-decoupling water revenue adjustment mechanisms; (2) the Commission incorrectly denied Great Oaks equal treatment under the law with respect to memorandum account treatment for lost revenues due to mandatory conservation requirements imposed by the Santa Clara Valley Water District ("SCVWD"); (3) the Decision adopted a methodology to true-up interim rates

that violates due process requirements and Commission ratemaking rules; (4) the Commission unlawfully modified an existing memorandum account without notice and opportunity to be heard in violation of Public Utilities Code section 1708;[1] (5) the Decision adjusted salaries retroactively and is arbitrary and unsupported by the evidence; (6) the Commission's interpretation of the federal tax code and federal tax regulations on the Domestic Production Activities Deduction ("DPA Deduction") is incorrect; (7) the Commission erroneously determined that the California Motor Vehicle License fee is not a tax; (8) in adopting a funding mechanism for a capital project, the Commission unlawfully deviated from the methodology authorized for other water utilities; (9) the Decision erroneously relies on a flawed Division of Water and Audits' ("DWA") Verification Report; (10) the elimination of Great Oaks' right to seek a waiver of the GRC application filing requirements constitutes error; (11) the Decision unlawfully requires Great Oaks to file reports not required of other Class A water utilities; and (12) proper notice was not given prior to the adoption of the conservation rates that are unsupported by the record.[2]

We have carefully considered the arguments raised in the application for rehearing and are of the opinion that good cause has been established to grant limited rehearing to determine: (1) the appropriate DPA Deduction, and (2) the appropriate adjustment for unregulated activities. In addition, D.10-11-034 will be modified to clarify our discussion concerning our determination that Great Oaks' existing SCVWD memorandum account established by Resolution W-4534 for the SCVWD litigation costs covered all related SCVWD litigation. We also modify D.10-11-034 to correct typographical errors and to remove other unnecessary language as set forth below. In all

[1] Unless otherwise specified, subsequent section references are to the Public Utilities Code.

[2] A summary of alleged errors at the beginning of Great Oaks' rehearing application includes an allegation D.10-11-034 erroneously adopts an uncollectible expense amount that is not supported by any evidence. (Rehrg. App., p. 2.) However, there is no further discussion of this issue in the rehearing application. The adopted uncollectible expense amount is supported by the evidence as D.10-11-034 adopted DRA's uncollectible expense recommendation presented in its testimony. (Exhibit ("Exh.") 16, pp. 4-3 to 4-4.)

other respects, we deny the application for rehearing of D.10-11-034, as modified herein, because no legal error has been shown.

II. DISCUSSION

A. Conservation Rate Design

In D.10-11-034, we authorized Great Oaks to establish a Monterey-style water revenue adjustment mechanism ("Monterey-style WRAM") in conjunction with the introduction of conservation rates.[3] Great Oaks contends D.10-11-034 deviates from Commission policy and past decisions authorizing full revenue-decoupling water revenue adjustment mechanisms ("full revenue-decoupling WRAM") coincident with adoption of conservation rate design and conservation rates.[4] (Rehrg. App., p. 2.) Great Oaks asserts the Commission has consistently authorized a full revenue-decoupling WRAM when implementing experimental or pilot programs of conservation rate design, and the only exception to this policy is when adopting such a mechanism would result in removing a conservation incentive and such a situation does not exist with Great Oaks. (Rehrg. App., pp. 5-6.) Great Oaks challenges this issue on multiple grounds.

1. Equal Protection

Great Oaks argues it has been denied the same revenue decoupling WRAM authorized for other Class A water utilities when those utilities, like Great Oaks, were ordered to implement a pilot program with conservation rates. (Rehrg. App., pp. 5-9.) Great Oaks contends by being denied a full revenue-decoupling WRAM, it has been denied equal protection under the law. (Rehrg. App., p. 13.) Great Oak cites to six

[3] The Monterey-style WRAM tracks the difference between the tiered conservation quantity rates and the uniform, single quantity rate that would have been received had the uniform, single quantity rate been in effect. (Resolution ("Res.") W-4910, p. 8.)

[4] A full revenue-decoupling WRAM is a fixed cost balancing account that ensures recovery of authorized fixed costs regardless of sales volume by tracking the difference between fixed costs recovered from customers and authorized fixed costs.

decisions where the Commission adopted a full revenue-decoupling WRAM for Class A water companies.[5] Great Oaks' claim is without merit.

"The equality guaranteed by the equal protection clauses of the federal and state Constitutions is equality under the same conditions, and among persons similarly situated."[6] Case law establishes the threshold test for an equal protection claim and provides the "similarly situated" requirement means that an equal protection claim will fail, and requires no further analysis unless the claimant demonstrates the two groups are sufficiently similar with respect to the purpose of the law in question.[7]

Great Oaks offers no facts or analysis of how it is similarly situated to other Class A water companies that have full revenue-decoupling WRAMs. Great Oaks offers only general statements that the Commission has adopted full revenue-decoupling WRAMs for other Class A water utilities when adopting conservation rates on an experimental or initial basis. (Rehrg. App., p. 5.) A review of the cases cited by Great Oaks shows each decision cited approved a settlement agreement containing a full revenue-decoupling WRAM, and thus, was not the result of a litigated outcome as is the case here. Great Oaks is not similarly situated to other Class A water companies that received a full revenue-decoupling WRAM through a negotiated settlement. Moreover, we have authorized Monterey-style WRAMs for other Class A water companies.[8]

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[5] Great Oaks cites to D.08-02-036, D.08-06-002, D.08-08-030, D.08-11-023, and D.09-05-005 to argue the Commission has consistently adopted full revenue-decoupling WRAM ratemaking mechanisms when adopting conservation rates on an experimental basis. (Rehrg. App., pp 5-8.)

Unless otherwise indicated, citations to Commission decisions in this order are to pdf versions found on the Commission's website at http://docs.cpuc.ca.gov/cyberdocs/Libraries/WEBPUB/Common/decSearchDsp.asp.

[6] *Adams v. Commission of Judicial Performance* (1994) 8 Cal.4th 630, 659.

[7] *Griffiths v. Superior Court of Los Angeles County* (*"Griffiths"*) (2002) 96 Cal. App.4th 757, 775.

[8] See D.08-02-036 adopting a settlement containing a Monterey-style WRAM for Suburban Water Company, D.08-08-030 adopting a settlement containing a Monterey-style WRAM for San Jose Water Company, and D.10-04-031 adopting a Monterey-style WRAM for San Gabriel.

2. Due Process

Great Oaks contends that we violated due process when we allegedly adopted in D.10-11-034 a new and subjective standard and policy for obtaining a full revenue-decoupling WRAM when establishing a pilot program for conservation rates. Great Oaks argues past policy did not condition a full revenue decoupling WRAM on a utility's past actions in promoting water conservation. Specifically, Great Oaks contends that it was given no notice or opportunity to be heard on this new policy. (Rehrg. App., p. 11.) Accordingly, it asserts that this amounts to both substantive and procedural due process violations. (Rehrg. App., p.13.) Great Oaks' argument has no merit.

In D.10-11-034, we are not adopting a new standard for obtaining a full revenue-decoupling WRAM and are not changing any policy, or standard, or prior decision. Rather we have considered the evidence in this proceeding and concluded a Monterey-style WRAM is appropriate in this circumstance where Great Oaks has not been actively pursing water conservation. D.10-11-034 is not arbitrary, as it was based upon the record which demonstrated Great Oaks informed its customers its water supply was bountiful and did not encourage conservation.

Moreover, we are not departing from past precedent in adopting a Monterey-style WRAM for Great Oaks. As stated above, the five Class A water utilities Great Oaks contends received full revenue-decoupling WRAMs did so as part of adopted settlement agreements. As Rule 12.5 of our Rules of Practice and Procedure expressly provides, adoption of a settlement "does not constitute approval of, or precedent regarding, any principle or issues in the proceeding or in any future proceeding."[9] Thus we are not departing from precedent when adopting a Monterey-style WRAM for Great Oaks. Moreover, Great Oaks has not pointed to any Commission decision that states a utility must be granted a full revenue-decoupling WRAM with the adoption of a conservation rate design.

[9] Unless otherwise specified, subsequent rule references are to the Commission's Rules of Practice and Procedure.

D.10-11-034 also did not violate procedural due process requirements. Due process requirements under the United States and California constitutions require the Commission to provide parties adequate notice and opportunity to be heard.[10] The pleadings filed for this proceeding demonstrate the Commission properly complied with due process requirements and Great Oaks has not been denied notice and an opportunity to be heard on this issue. Great Oaks filed various pleadings and submitted exhibits on this issue. It also participated in the evidentiary hearing in which this issue was raised. Great Oaks had notice that we would consider conservation rate design in this proceeding and were encouraging increasing-block rates.[11] DRA's testimony presented an increasing block rate proposal with a Monterey-style WRAM. (Exh. 16, p. 14-12.) Great Oaks had an opportunity to cross-examine the DRA witness on the proposal and in doing so, DRA's witness testified it did not recommend a full WRAM because "Great Oaks doesn't have a lot of experience in conservation on record, hasn't had a conservation program in place." (RT Vol. 4, p. 332.) Great Oaks had an opportunity to address DRA's proposed rate design and Monterey-style WRAM in its briefs. Great Oaks also had the opportunity to address the proposed adoption of a Monterey-style WRAM for Great Oaks in its comments on the Proposed Decision and Alternate (Great Oaks Comments on PD p. 2, Great Oaks Comments on Alternate, p. 2.) Great Oaks was not denied notice and opportunity to be heard on this issue.

3. Confiscatory Rates

Great Oaks argues denying it a full revenue-decoupling WRAM decreases its opportunity to earn its authorized rate of return. Accordingly, it asserts that the

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[10] *See* U.S. Const., 14th Amend., Cal. Const., art. 1, § 7. *See also People v. Western Airlines* (1954) 42 Cal.2d 621, 632.

[11] December 2, 2009 Assigned Commissioner and ALJ's Ruling and Scoping Memo, p. 4; see also, CPUC December 15, 2005 Water Action Plan, p. 8. Great Oak had the opportunity to submit supplemental testimony proposing a conservation rate design but choose not to. (RT PHC, pp. 29-31; D.10-11-034, p. 5.)

Commission has effectively reduced its authorized rate of return below a level necessary to avoid confiscatory rates. (Rehrg. App., p. 11.) This argument also lacks merit.

The Fifth Amendment to the United States Constitution provides "private property [shall not] be taken for public use without just compensation."[12] The takings clause "limits the power of the states to regulate, control, or fix prices that producers charge consumers for good or services." (*20th Century Ins. Co. v. Garamendi,* (1994) 8 Cal4th 216, 292.) In the leading cases of *Federal Power Commission v. Hope Natural Gas. Co. ("Hope")* (1944) 320 U.S. 591, 603 and *Duquesne Light. Co. v. Barasch* (1989) 488 U.S. 299, 307, the U.S. Supreme Court held an unlawful taking or confiscation does not occur unless a regulation or rate is unjust and unreasonable. As established in *Hope*, *supra*, 320 U.S. at p. 602: "It is not the theory, but the impact of the rate order that counts. If the total effect of the rate order cannot be said to be unreasonable, judicial inquiry is at an end."

Essentially, Great Oaks is arguing that when we adopt conservation rates we must concurrently adopt a ratemaking mechanism that *insures* Great Oaks recovers all fixed cost associated with *any* future reduction of sales below adopted sale regardless of the reason for the reduction. Great Oaks cites to no case authority in support of such argument.

We are not obligated to guarantee a revenue stream to Great Oaks. Instead, our duty is to afford Great Oaks with an opportunity to earn a reasonable return. (*Southern Cal. Edison Co. v. Public Utilities Com*. (1978) 20 Cal.3d 813, 821, fn. 8; see also, *Hope*, *supra*, 320 U.S 591, *Duquesne*, *supra*, 488 U.S. 299.) We have done just that. The rate design and Monterey-style WRAM provide Great Oaks with an opportunity to earn its rate of return. The fact Great Oaks is unhappy with our determination does not constitute a confiscatory result or a taking, and thus, there is no error.

[12] Article 1, § 19 of the California Constitution provides similar protection.

B. Mandatory Conservation Memorandum Accounts

In Advice Letter 197-W, filed February 2, 2010, Great Oaks requested authority to establish two memorandum accounts, effective the same day and lasting through June 30, 2010. The requested memorandum accounts were: (1) a Mandatory Conservation Memorandum Account to track operational and administrative costs associated with implementing water conservation programs and practices; and (2) a Mandatory Conservation Revenue Adjustment Memorandum Account ("MCRAMA") designed to track the financial impacts on quantity revenues occurring during times when mandatory conservation practices are required by outside governmental or municipal agencies. (Advice Letter 197-W, p. 1.) In Resolution W-4838, we denied Great Oaks authority to establish the two memorandum accounts. We opined that rejection of Great Oaks' advice letter would not prejudice Great Oaks because the issues underlying the need to establish the two memorandum accounts were being reviewed as part of A.09-09-001. (Res. W-4838, p. 7.) We further stated because Great Oaks has interim rates in place effective September 2009, the ultimate resolution of the issues raised in the advice letter could be dealt with in A.09-09-001 and there would be no retroactive ratemaking concerns to address. (Res. W-4838, p. 7.)

Great Oaks contends that when we issued Resolution W-4838, it was the first time we advised Great Oaks that issues pertinent to the time period of September 1, 2009 to June 30, 2010 would be addressed in A.09-09-001. (Rehrg. App., p. 19.) Great Oaks asserts because D.10-11-034 denied its motion to reopen the record and update water sales data and address the MCRAMA, these issues were not addressed in this proceeding. Therefore, Great Oaks contends that "the MCRAMA requested by Great Oaks in Advice Letter 197-W [was] not being addressed by the Commission at all, in any proceeding." (Rehrg. App. p. 19, emphasis omitted.) Great Oaks contends failure to address this issue violates its due process rights as it was not provided an opportunity to be heard on this issue. (Rehrg. App., p. 20-21.) Great Oaks' argument is without merit.

Great Oaks' request for a MCRAMA for the time period of February 2010 to June 30, 2010 was addressed and denied in Resolution W-4838. Resolution W-4838

found that "Great Oaks did not establish that it met the factors for establishing a memorandum account." (Res. W-4838, p. 8; see also, *Order Denying Rehearing of Resolution W-4838* [D. 10-12-062] (2010) ___ Cal.P.U.C.3d___, at p. 7 (slip op.).) In rejecting Great Oaks' memorandum account request, Resolution W-4838 stated Great Oaks would not be prejudiced because the *issues* underlying the need for the memorandum accounts are being reviewed as part of A.09-09-001. The underlying issues involve the reduction of sales, if any, from conservation not Great Oaks' request for a MCRAMA. (See *Order Denying Rehearing of Resolution W-4838* [D.10-12-062], *supra* at p. 11 (slip op.).) As D.10-12-062 stated, "the rates that the Commission ultimately adopts in A.09-09-001 will go back to September 1, 2009, and will be reflective of the Commission's determination of the appropriate sales forecast given the circumstances for Great Oaks." (*Ibid.*)

D.10-11-034 considered the appropriate sales forecast for Great Oaks. D.10-11-034 addressed Great Oaks' request for both a drought adjustment and a SCVWD conservation sales adjustment and rejected those requests. (D.10-11-034, p. 16.) While the proceeding did not specifically look at data for the time period of February 2010 through June 2010, Great Oaks cites no law or decision requiring the Commission to do so. Great Oaks fails to acknowledge the Commission has discretionary authority to determine what rates are just and reasonable. The rates adopted in D.10-11-034 are trued up to September 1, 2009 and thus are reflective of the Commission's determination of the appropriate sales forecast given the circumstances for Great Oaks.

Great Oaks' contention that it had not received notice that the time period of September 1, 2009 through June 30, 2010 would be addressed in A.09-09-001 prior to the issuance of Resolution W-4838 is also erroneous. (Rehrg. App., p. 19.) In *Revised Rate Case Plan Decision* [D.07-05-062] the Commission stated:

> A water utility that experiences a delay beyond three-years in filing a GRC application due to the transition to the RCP schedule may seek to implement an interim rate change via an advice letter. . . .[¶] . . . These interim rates, when approved,

> will be subject to refund and shall be adjusted upward or downward back to the effective date of the interim rates with the adoption of final rates by the Commission at the conclusion of a GRC scheduled under the RCP.

(*Opinion Adopting Revised Rate Case Plan for Class A Water Utilities ("Revised Rate Case Plan Decision*") [D.07-05-062] (2007) ___Cal.P.U.C.3d.___ at Appendix A, pp. A-2-A3 (slip. op.).)

Thus Great Oaks had notice that rates for the transition period would be addressed in this GRC. To the extent that Great Oaks may be seeking to use its application for rehearing of D.10-11-034 to challenge the *Revised Rate Case Plan Decision* [D.07-05-062], it is untimely and an impermissible collateral attack of that decision. (See Pub. Util. code, §§ 1709 & 1731, subd. (b).)[13]

C. Interim rate true-up

On July 16, 2009, Great Oaks filed Advice Letter 196-W requesting interim rates pursuant to *Revised Rate* Case *Plan Decision* [D.07-05-062] because its rate case was delayed beyond the three year rate case cycle (referred to herein as "transition year interim rates"). On September 8, 2009, the Commission's Division of Water and Audits approved Advice Letter 196-W (as supplemented), with transition interim rates effective September 1, 2009.

D.10-11-034 ordered Great Oaks to true-up transition year interim rates using a methodology we have previously used to true up interim rates granted because a GRC was not processed in time to make rates effective on the first day of the test year.[14] Great Oaks contends using this interim rate true-up mechanism violates due process

[13] Section 1709 provides: "In all collateral actions or proceedings, the orders and decision of the [C]omission which have become final shall be conclusive." Section 1731(b) provides that challenges to a Commission decision must be made in an application for rehearing within 30 days of the decision's issuance.

[14] Section 455.2 allows a utility to implement interim rates when a GRC proceeding delay prevents implementation of the new GRC rates on the first day of the GRC test year. Under section 455.2, interim rates are calculated by increasing existing rates by the rate of inflation.

requirements and Commission ratemaking rules. (Rehrg. App., pp. 24-25.) Specifically, Great Oaks argues this methodology is erroneous and unlawful because it fails to consider ratemaking data for the transition period and wrongfully uses data from the test year period to true-up transition year interim rates. (Rehrg. App., pp. 23-34.) Great Oaks also contends the methodology is unlawful because no consideration was given to the proper rate of return that Great Oaks would have an opportunity to earn during the transition period. (Rehrg. App., p. 25.)

Great Oaks fails to prove any error in the Decision. Great Oaks does not explain how updating transition year interim rates based upon forecasted, test year rates violates due process. Great Oaks' position appears to be that the Commission must adopt a methodology that uses actual data to update transition year interim rates. However, Great Oaks cites no law requiring the Commission to use actual transition year data to true-up interim rates during the transition year. Moreover, Great Oaks fails to explain how using a previously authorized rate of return for any part of the transition period is unreasonable or unlawful.

In the *Revised Rate Case Plan Decision*, [D.07-05-062] we approved transition year interim rates for all water utility experiencing a delay beyond three-years in filing a GRC application due to the change to the new rate case plan schedule. While *Revised Rate Case Plan Decision* did not specifically define the true-up mechanism that would be used, it did not contemplate a new cost of capital for the transition period as the Commission required Great Oaks to file a cost of capital application on May 2, 2009, with an effective date of July 1, 2010.[15] To the extent Great Oaks may again be seeking

[15] *Revised Rate Case Plan Decision* [D.07-05-062] *supra,* at Appendix A, p. A-17. As required by D.07-05-062, Great Oaks filed its cost of capital application in May of 2009 (A.09-05-007). In D.10-12-057, the Commission set Great Oaks' new cost of capital; however, D.10-12-057 mistakenly made the new cost of capital effective January 2010 rather than July 2010 as set forth in D.07-05-062. Thus Great Oaks was compensated for a different rate of return during part of the transition period.

to use its application for rehearing of D.10-11-034 to challenge the *Revised Rate Case Plan Decision* [D.07-05-062], it is untimely and prohibited by sections 1709 and 1731(b).

D. SCVWD Litigation Memorandum Account

In D.10-11-034, we disallowed all SCVWD litigation expenses included in Outside Services Account 798 and found Great Oaks must use the memorandum accounting procedures established in Resolution W-4534 for SCVWD litigation expenses it seeks to recover from ratepayers. (D.10-11-034, p. 42.) D.10-11-034 concluded that outside services litigation expenses should be handled through the existing SCVWD memorandum account, because: (1) amending Great Oaks' initial lawsuit *Great Oaks Water Co. V. Santa Clara Valley Water District,* Case No. 1-05-CV-053142 ("Lead Case") did not change the terms of the memorandum account; (2) subsequent lawsuits against SCVWD are related to the Lead Case; and (3) Great Oaks filed Stipulations with the Santa Clara District Court agreeing there was substantial overlap between the issues in the Lead Case and subsequent cases. (D.10-11-034, pp. 40-42.) Because Resolution W-4534 required Great Oaks to record the litigation expenses in the memorandum account on a monthly basis and Great Oaks did not do so, D.10-11-034 determined that there was no eligible balance in the memorandum account. (D.10-11-034, p. 42.)

Great Oaks contends D.10-11-034 unlawfully modified the existing SCVWD litigation memorandum account adopted in Resolution W-4534, in violation of Great Oaks' due process rights and section 1708. (Rehrg. App., p. 30.) Great Oaks argues that D.10-11-034 modifies Resolution W-4534, by applying the adopted memorandum account "to other subsequent lawsuits that were not the subject of Res. W-4534." (Rehrg. App., p. 28.) Although not specifically stated, Great Oaks also appears to be claiming that the Commission included additional causes of action against SCVWD not included in Resolution W-4534.[16] Great Oaks states the Scoping Memo only

[16] During the proceeding, Great Oaks contended the Proposition 218 cause of action was not included in the SCVWD litigation memorandum account authorized in Resolution W-4534. (Exh. 8, p. 12; Great Oaks Opening Brief, p. 55; Great Oaks Comments on the Proposed Decision of ALJ Walwyn, p. 20.)

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referenced the "establishment, discontinuance, or continuation of balancing and memorandum accounts to track specific expenses" and the issue of continuing or modifying the Resolution W-4534 memorandum account was not an issue raised or contested by any party. (Rehrg. App., p. 27-28.) Great Oaks also asserts the scope of the proceeding did not include whether Great Oaks was entitled to recovery under the Resolution W-4534 memorandum account. (Rehrg. App., p. 27.) Great Oaks requests all findings, conclusions and ordering paragraphs relating to Resolution W-4534 be eliminated.[17] (Rehrg. App., p. 31.)

Great Oaks has not demonstrated legal error as D.10-11-034 did not modify the SCVWD litigation memorandum account established in Resolution W-4534.

1. Background

On April 8, 2005, Great Oaks filed Advice Letter 169-W seeking to establish a memorandum account "to track the litigation expenses of a suit against the Santa Clara Valley Water District." (Res. W-4534, p. 2.) The advice letter indicated the litigation involved legal challenges to the pump tax levied by the Santa Clara Valley Water District on water Great Oaks draws from the ground and identified two legal challenges – (1) SCVWD violated the Water District Act by including most of Great Oaks' wells in the higher pump tax zone; and (2) SCVWD spent pump tax revenue in violation of Water District Act Section 26.3. (Advice Letter 169-W, p. 2.) In the advice letter Great Oaks agreed "to cap the total litigation expenses for successful judgment at the $100,000 in the memorandum account plus a maximum of $300,000 which may have accrued at the Company risk." (Advice Letter 169-W, p. 4.) Great Oaks informed the Commission an outside law firm thought the suit would be won and had committed to

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Great Oaks implies this is still an issue in its discussion of estoppel when it states "Great Oaks has always said that its SCVWD litigation includes claims not addressed in Res. W-4534." (Rehrg. App., p. 29.)

[17] Great Oaks does not identify which findings of fact, conclusions of law, and ordering paragraphs it contends are related to this issue.

costs being $100,000 or less. (Res. W-4534, p. 6.) Great Oaks did not request legal costs from only some causes of action be booked to the memorandum account or be subject to the cap. Great Oaks also never informed the Commission it would be necessary to file a complaint each year to recover future year pump tax payments.[18]

On May 5, 2005, the Commission issued Resolution W-4534 approving Great Oaks' Advice Letter request for a SCVWD litigation expense memorandum account. Resolution W-4534 authorized the following language to Great Oaks' Preliminary Statement in its tariff: "The Company by this tariff has established a Santa Clara Valley Water District Memorandum Account to track the costs related to litigation against the Water District. The Memorandum Account is capped at a maximum of $100,000."[19] The Tariff also states: "The Company will track the costs of litigation in the Memorandum Account."[20]

On November 22, 2005, Great Oaks filed superior court complaint 1-05-CV-053142 ("Lead Case") against SCVWD for violations occurring during the time period July 1, 2005 to June 30, 2006. (Exh. 8, p. 4.) Great Oaks' complaint included the two legal challenges it identified in Advice Letter 169-W and also included other causes of action including challenging the pump tax as violating Proposition 218. (Exh. 8, p. 12.).

Great Oaks initiated similar complaints for subsequent time periods. The evidence indicates there are similar individual complaints for the time periods July 1, 2006 to June 30, 2007, July 1, 2007 to June 30, 2008, and July 1, 2008 to June 30, 2009.[21] All of Great Oaks' complaints seek refunds of groundwater charges and related

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[18] In Advice Letter 169-W Great Oaks states in addition to forward looking savings, there is the opportunity for rebates but does not disclose that it would need to file a complaint each year to obtain rebates for each water year. (Advice Letter 169-W, p. 2.)

[19] Great Oaks Tariff Cal. P.U.C. Sheet No. 465-W.

[20] Great Oaks Tariff Cal. P.U.C. Sheet No. 465-W.

[21] RT Vol. 3, pp. 291-292. Great Oaks' General Counsel Mr. Guster testified some suits are reverse validation cases which challenge the validity of the groundwater charge imposed by the Water District

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relief on the basis SCVWD violated Proposition 218 and the Santa Clara Valley Water District Act. Subsequent complaints are stayed pending the outcome of the Lead Case. (RT Vol. 3, pp. 291-292.)

2. The Decision did not modify Resolution W-4534

In D.10-11-034, we did not modify Resolution W-4534 as Great Oaks contends. Rather we concluded the Lead Case and subsequent related cases are covered by the existing SCVWD memorandum account authorized in Resolution W-4534. The evidence demonstrates this is a rational interpretation of what should be booked to the existing memorandum account, and, is not a rescission, alteration, or amendment of a prior Commission decision.

As previously stated, when Great Oaks filed Advice Letter 169-W requesting a SCVWD litigation expense memorandum account it did not specifically limit its request to specific causes of action nor did it disclose to the Commission its complaint would include causes of action not disclosed in its advice letter. If Great Oaks wanted to book litigation expenses associated with some causes of action to the memorandum account but not others, Great Oaks would have needed have requested such authorization as issues such as allocation of costs or rebates would need to be addressed.

Great Oaks advice letter also did not specifically limit litigation to any particular time period or disclose to the Commission it would be necessary for Great Oaks to file an annual complaint to recover the pump taxes collected for each water year. The evidence demonstrates Great Oaks initiated similar complaints for subsequent time periods that are based upon the same character of claims and facts.[22] Great Oaks filed

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under validation statues, making them an *in rem* kind of action. (RT Vol. 3, pp. 292.) The complaint numbers identified in the record are 1-07-CV-087884, 1-08-CV-119465, 1-08-CV-123064, and 1-09-CV-146018. (April 12, 2010, Response of Great Oaks Water Company to Motion of Division of Ratepayer Advocates, Declaration of Timothy S. Guster, Exh. 2.)

[22] Great Oaks' General Counsel, Mr. Guster testified that there are similar individual suits for the time periods July 1, 2006 to June 30, 2007, July 1, 2007 to June 30 2008, and July 1, 2008 to June 30 2009.

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stipulations in the Santa Clara County Superior Court, which stated there is "substantial overlap between the issues in the Lead Case and the issues is the other cases."[23]

It is reasonable to conclude the SCVWD litigation expense memorandum established in Resolution W-4534 authorized Great Oaks to book litigation costs associated with the issue of unlawful pump taxes and was not limited to specific causes of actions, complaints, or time periods. The adopted tariff language is consistent with such interpretation.

Moreover, limiting the memorandum account to only the Lead Case is illogical as it would contradict the justification Great Oaks provided for establishing the memorandum account. Great Oaks had argued a memorandum account would benefit ratepayers because the Company will undertake the litigation without any reward except the recovery of expenses. (Advice Letter 169-W, p. 3.) Great Oaks stated "[b]ecause the pump tax is a pass through expense, the Company's view is any money recovered should belong to the ratepayers." (Advice Letter 169-W, p. 3.) The Commission granted Great Oaks its requested memorandum account relying on this representation. (Res. W-4534, p. 5.) However, Great Oaks' interpretation that the memorandum account covered only some causes of action or only some complaints could result in windfall for Great Oaks' shareholders at the expense of Great Oaks ratepayers. This result would be contradictory to Great Oaks' claim that recovery of the pump taxes belongs to the ratepayers. If the memorandum account does not cover subsequent related suits, there is no assurance

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(RT Vol. 3, pp 291-292.) Great Oaks CEO testified they would likely be filing another lawsuit against SCVWD as "every year the Water District charges . . . a new pump tax. . . so each year a new cause of action arises. (RT Vol. 3, p. 199.) The issues in the subsequent cases overlap with the Lead Case because, as Great Oaks General Counsel testified, SCVWD "has used the same process every year . . . [and] many of the same factual issues apply." (RT Vol. 3, pp. 291- 292.) Great Oaks' own brief concludes "subsequent lawsuits have been based upon the same character of claims and facts" based on the same evidence (Great Oaks Opening Brief, p. 58.)

[23] Response of Great Oaks to Motion of Division of Ratepayer Advocated, April 12, 2010, Declaration of Timothy S. Guster, Exh. 2. The "other cases" referred to are 1-07-CV-087884, 1-08-CV-119465, 1-08-CV-123064, and 1-09-CV-146018.

refunded pump taxes would be returned to ratepayers as required by the terms of the memorandum account. Moreover, because the subsequent suits are stayed pending final determination of the Lead Case, we assume there are fewer litigation expenses being incurred for these subsequent suits. Thus ratepayers are paying the costs, up to the cap, for the Lead Case against SCVWD but shareholder could reap the rewards from the subsequent suits.

While Great Oaks has not established legal error, we believe that some clarification is necessary to fully explain our conclusions that the SCVWD litigation expense memorandum account established in Resolution W-4534 covers both Great Oaks' initial complaint and subsequent related complaints. Accordingly, we modify D.10-11-034 to provide further discussion, findings of fact, and conclusions of law as set forth in the ordering paragraphs of today's decision.

3. The Decision is not based on erroneous factual or legal analysis.

Great Oaks contends the modification of Resolution W-4534 was based on erroneous factual and legal analysis. Specifically, Great Oaks claims D.10-11-034 erred by determining all of the subsequent cases were related in order to justify the inclusion of these cases under the terms of Resolution W-4534. Great Oaks accuses the Commission of failing to look at the underlying pleadings which are not part of the record. (Rehrg. App., p. 29.)

While the actual complaints are not part of the record, there was sufficient evidence in the record to conclude subsequent litigation with SCVWD is sufficiently related to be included in the existing SCVWD memorandum account.[24] Great Oaks' witness Mr. Guster testified many of the issues in the subsequent cases overlap with the Lead Case because the SCVWD "has used the same process every year . . . [and] many of the same factual issues apply." (RT Vol. 3, pp. 291- 292.) Great Oaks itself relies on

[24] Because we believe the record is legally adequate to support our conclusion on this issue, it is not necessary to look at the actual complaints, which no party even submitted.

this evidence to argue that "subsequent lawsuits have been based upon the same character of claims and facts." (Great Oaks Opening Brief, p. 58.) Moreover, Great Oaks filed Stipulations with the Superior Court in Santa Clara, agreeing there "was substantial overlap between the issues in the Lead Case and the issues is the other cases" and included these Stipulations in a filing in this proceeding.[25] Thus there was sufficient evidence in the record to conclude the Lead Case and subsequent cases are sufficiently related.

Great Oaks also asserts D.10-11-034 incorrectly applied the law of estoppel and lacks any legal analysis of the doctrine. (Rehrg. App., p. 29.) We need not address the issue of estoppel as Great Oaks has misinterpreted the Decision. D.10-11-034 does not use the doctrine of estoppel to find the SCVWD litigation expense memorandum account included all claims and complaints. Rather based on the evidence in the record, and not the doctrine of estoppel, D.10-11-034 concluded that the Lead Case and subsequent related cases address substantially overlapping legal issues However, the use of the word "estopped," may have caused some confusion and we modify D,10-11-034 as set forth in the ordering paragraphs below.

4. The Decision properly addressed whether Great Oaks complied with the terms of the Memorandum Account.

Great Oaks argues the scope of the proceeding did not include whether Great Oaks was or was not entitled to recovery under the Resolution W-4534 memorandum account. (Rehrg. App., p. 27.) Great Oaks claims recovery was not an issue until the close of evidentiary hearings when the ALJ asked parties to brief the "status and the eligible balances of litigation memorandum accounts that have been previously authorized," and whether "the Commission should authorize any further or new memorandum accounts for litigation." (Rehrg. App., p. 27.) Great Oaks contends

[25] Response of Great Oaks to Motion of Division of Ratepayer Advocated, April 12, 2010, Declaration of Timothy S. Guster, Exh. 2.

until that time, the scope of the proceeding did not include whether Great Oaks was entitled to recovery under the Resolution W-4534 memorandum account. (Rehrg. App., p. 27.)

Great Oaks' claim that the issue of recovery of expenses in the memorandum account was not at issue in this proceeding lacks merit. The issue addressed by D.10-11-034 was not whether Great Oaks should be able to recover the litigation costs under the Resolution W-4534 memorandum account. Rather the issue addressed was whether Great Oaks had complied with Commission ordered memorandum account accounting requirements.

Under sections 701 and 792, the Commission has ample authority to prescribe the form and manner of accounts and memoranda utilities are to maintain. Section 701 authorizes the Commission "to do all things ... necessary and convenient in the exercise of" its regulatory jurisdiction. Section 792 authorizes it to prescribe "the forms of accounts, records and memoranda" it deems necessary to carry out its regulatory duties. In issuing Resolution W-4534 and approving Great Oaks' advice letter for a SCVWD litigation expense memorandum account, we required Great Oaks to make entries in the memorandum account at the end of each month.[26] Great Oaks failed to make any entries into the memorandum account. (Exh. 14, p. 2.) Thus, there were no litigation expenses booked to the memorandum account and available for recovery at a future time. Consequently, there is no error in Finding of Fact 17 which states:

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[26] Great Oaks Tariff Cal. P.U.C.Sheet No. 466-W states:

> a. The expenses of capital investment to be included in the Memorandum Account must be additional or incremental to those allowed in the Company's last general rate case proceeding. The Company shall make entries to the Memorandum Account at the end of each month in the following manner:
>
> 1. Debit entries equal to the incremental or additional amounts recorded in the company's operations, maintenance, administrative and general expense accounts that were incurred as a result of the triggering event.

(Emphasis added.)

> Great Oaks' tariff pages implementing Resolution W-4534 specifically require that any expense eligible for memorandum account treatment must be recorded on a monthly basis. Great Oaks has not recorded any expenses into this memorandum account.

Moreover, Great Oaks had sufficient notice and opportunity to comment on this issue. DRA cross-examined Great Oaks' witness on whether SCVWD litigation costs were being booked to a memorandum account. (RT Vol. 3, 240-241, 250-251.) In Exhibit 14, Great Oaks admits it "has not tracked legal expenses in a memorandum account even though authorized by Resolution W-4534 to do so." (Exh. 14, p. 2.) As previously mentioned, the ALJ gave Great Oaks the opportunity to comment on this issue when she ordered the parties to brief the issue of "the status and the eligible balances of litigation memorandum accounts that have been previously authorized." (RT Vol. 4, pp. 399-400.) Although Great Oaks argues it was legal error for the ALJ to raise this issue on her own at the conclusion of hearings, there is no error. Rule 9.1 of the Commission's Rules of Practice and Procedure sets forth our ALJs' authority and states they "may take such other action as may be necessary and appropriate to the discharge of his duties, consistent with the statutory or other authorities under which the Commission functions and with the rules and policies of the Commission." It is common practice for Commission ALJs to request parties brief issues that arise during hearing.[27] The ALJ appropriately gave Great Oaks notice and an opportunity to address the accounting issue that arose during the course of the proceeding. Moreover, this issue was within the scope of this GRC proceeding because it involved the accounts of the utility.

[27] *See Decision Setting Mobilhome [sic] Park Water Rates and Conditions of Water Service, and Mandating Related Accounts* [D.12-02-023] (2012), ___Cal.P.U.C.3d___, p. 39 (slip op.) [The ALJ asked parties to brief the Commission's ability to make refunds for the time period before the filing of the Complaint.]; *Opinion Resolving General Rate Case* [D.04-12-018] (2004), ___Cal.P.U.C.3d___, p. 5 (slip op.) [The ALJ asked parties to brief whether the Commission would continue to have jurisdiction over SCE's gas operation in Catalina once SCE replaces its gas vaporization plant.].

E. Salary Adjustments

Great Oaks contends D.10-11-034 employs two methodologies to reduce salaries that are arbitrary and contrary to the evidence.

1. Non-management salaries

Great Oaks contends using the Commission's October 2009 labor escalation rates to forecast non-management salaries rather than using the labor escalation rates for the time the salary increases were made was erroneous and arbitrary. (Rehrg. App., pp. 32-33.) Great Oaks asserts the Commission must use the labor factors published at the time Great Oaks gave salary increases to determine the reasonableness of the increase. (Rehrg. App., p. 32.) Great Oaks claims there is no Commission precedent that permits the Commission to determine reasonableness by using data for an entirely different period of time in the future. (Rehrg. App. p. 35.) Great Oaks asserts the evidence shows non-management salaries were increased in early 2009 and the increases were within the labor escalation rate published at the time. (Rehrg. App., p. 32.)

Great Oaks appears to misunderstand our ratemaking process. We are not judging past salary increases but are adopting prospective forecasted non-management salary expenses for ratemaking purposes. The record shows D.10-11-034 considered the evidence and determined Great Oaks had not justified the salary level requested for its general office and field employees. (D.10-11-034, p. 31 & Conclusion of Law 6.) D.10-11-034 noted Great Oaks did not provide a sufficient salary comparison for the customer service manager salary. (D.10-11-034, p. 31.) D.10-11-034 also indicated that Great Oaks had added one and a half new customer service employees since 2007 even though it had not had an increase in the number of customers served. (D.10-11-034, p. 31.)

D.10-11-034 accepted as reasonable DRA's methodology which used historical data and adjusted that data using the most recent labor escalation rate to develop a forward-looking forecast. (Exh. 16, p. 3-5.) As D.10-11-034 states, the use of

labor escalation memorandum is routine in Commission proceedings.[28] D.10-11-034 weighed the record evidence and determined DRA's methodology was reasonable. Great Oaks' disagreement with our weighing of the evidence does not constitute legal error.

2. Management Salaries

Great Oaks argues D.10-11-034 erroneously adjusts the Chief Executive Officer ("CEO") Mr. Roeder's base salary down 10 percent, the Chief Financial Officer ("CFO") Ms. Morse's base salary down 5 percent, and the Regulatory Attorney, Mr. Loehr's salary down 10 percent, for time spent on non-utility business. Great Oaks contends the record does not support the adjustments to management's salaries. (Rehrg. App., p. 33.)

The Commission's Rate Case Plan and Revised Rate Case Plan require Class A water companies to:

> 1. Identify and explain all transactions with corporate affiliates involving utility employees or assets, or resulting in costs included in revenue requirements over the last five years. Include all documentation . . . necessary to demonstrate that any services provided by utility officers or employees to corporate affiliates are reimbursed at fully allocated costs.
> 2. To the extent the utility uses assets or employees included in revenue requirement for unregulated activities, identify, document, and account for all such activities, including all costs and resulting revenue. . .

(*Revised Rate Case Plan Decision* [D.07-05-062], *supra,* at Appendix A, p. A-30 & A-31; see also, *Interim Order Adopting Rate Case Plan* [D.04-06-018] (2004) ___ Cal.P.U.C.3d ___ at Appendix, p. 9 (slip op.)) Although the Commission has reminded Great Oaks it must comply with these requirements for transaction with corporate

[28] In D.03-02-030, the Commission adopted ORA's non-union payroll estimate which used the most recent DRI labor escalation factor. (*Opinion Resolving General Rate Case* [D.03-02-030] (2003) ___Cal.P.U.C.3d___, at pp. 13-14 (slip op.).)

affiliates and unregulated activities[29] Great Oaks' did not do so.[30] (Exh. 2, Vol. 1, Chapter 3, pp 8-9.) Great Oaks' managers do not track the time they spend on non-regulated activities. (RT Vol. 3, p. 252.)

In May 2008, Great Oaks established a wholly-owned subsidiary Great Oaks Water, LLC ("Great Oaks LLC") to purchase an office building at 20 Great Oaks Blvd., in San Jose. (Exh. 2, Vol. 1, Exh. E, Chapter 3, p 8; RT Vol. 3, p. 202.) Great Oaks leases office space from Great Oaks LLC and occupies approximately one sixth of the building. (RT Vol. 2, pp. 163-164.) Great Oaks LLC leases space to at least five other tenants. (RT Vol. 2, p.165.)

The evidence indicates Great Oaks' managers spend time on non-regulated activities. The evidence demonstrates that the duties of Mr. Loehr, Great Oaks' Regulatory Attorney, included managing the office building owned by subsidiary Great Oaks LLC. Mr. Loehr's title, as shown in Great Oaks' organization chart, was "Regulatory Attorney Property Manager." (Exh. 1, Vol. 1, Exh. 3-2.) As Property Manager, Mr. Loehr handled the leases with the other tenants and is responsible for dealing with the other tenants in the building. (RT Vol. 2, p. 177; Vol. 3, p. 258.) Mr. Loehr also interfaced with the owner of another building which shares a common parking lot and common facilities with the Great Oaks LLC owned building. (RT Vol. 2, pp.

[29] In Resolution W-4556, dated August 25, 2005, we reminded Great Oaks it needed to comply with requirements regarding transactions with corporate affiliates contained in D.04-06-018. (Res. W-4556, pp. 4-5.) In Resolution W-4594 authorizing Great Oaks a general rate increase, we again reminded Great Oaks of the affiliate transaction requirements and noted that Great Oaks had not established any formal bookkeeping for its transactions with affiliates. At that time Great Oaks had an affiliate Great Oaks Wireless Company. Resolution W-4594 allocated 30 percent of the wireless company revenue to ratepayers pursuant to D.00-07-018, D.03-04-028, and D.04-12-023 and ordered Great Oaks to establish accounting records to enter expenses, revenues and plant investment related to the operations of the wireless company. (Res. W-4594, pp. 5, 6, & 10.)

[30] Great Oaks structured its GRC application by restating the Revised Rate Case Plan minimum data request requirement and then providing its response to each requirement. However, when restating the Corporate and Unregulated Activities minimum data requirements, Great Oaks' application leaves out the requirement that it provide "all documentation . . . to demonstrate that any services provided by utility officers or employees to corporate affiliates are reimbursed at fully allocated costs" and does not provide this information. The Application did not identify, document and account for the time its managers spend on non-regulated activities.

177-178.) Great Oaks' General Counsel testified generally that Mr. Loehr was involved with issues pertaining to the building. (RT Vol. 3, p. 284.)

In the case of Great Oaks' CFO, Ms. Morse, the evidence demonstrates Ms. Morse coordinated with the outside tax preparer on the tax returns providing all of the numbers and explanations, including providing information necessary for Great Oaks LLC's returns. (RT Vol. 3, pp. 252-253.) Ms. Morse testified a separate corporate tax return for Great Oaks LLC was prepared for state tax purposes and a consolidated return was prepared for federal tax purposes. (RT Vol. 3, p. 253.) Ms. Morse also testified Great Oaks LLC's books were handled as a subaccount under Other Income and Expenses on Great Oaks' books and when outside service accounting work was done for Great Oaks LLC she was responsible for expensing it to Great Oaks LLC. (RT Vol. 3, p. 253.) Ms. Morse also handled accounting entries related to Great Oaks' non-regulated assets.[31] (RT Vol. 3, p. 257.)

Finally, the evidence demonstrates Great Oaks' CEO, Mr. Roeder also spent time on non-regulated activities. Mr. Roeder testified he handled more building management activities than Mr. Loehr. (RT Vol. 2, p. 178.) Mr. Roeder also testified he was fairly involved in the preparation of the financials that become part of the tax returns which Ms. Morse testified, included non-regulated activities. (RT Vol. 2, p. 172.) Both Ms. Morse and Mr. Loehr who spend time on non-regulated activities report to Mr. Roeder. (Exh. 2, Vol. 1, Exh. E, Exh. 3-2; RT Vol. 2, p. 175.)

The burden of proof rests with Great Oaks to demonstrate its managers' salaries are reasonable. The evidence demonstrates Great Oaks managers (Mr. Loehr, Mr. Morse and Mr. Roeder) spend time providing services to or for its unregulated subsidiary, Great Oaks LLC. Although we require Class A water companies to be reimbursed at fully allocated costs for services provided to affiliates, Great Oaks did not

[31] Ms. Morse testified Great Oaks owns some vacant property in Idaho as well as a large pieced of property that has a small shack on it and a building in Santa Clara (RT Vol. 3, p. 255.) She booked the income and expenses related to non-utility property. (RT Vol. 3, p. 257.)

do so. Moreover, Great Oaks' managers failed to track the time they spend on unregulated activities, and Great Oaks provided no estimate of this time for the record. Thus, Great Oaks did not produced evidence sufficient to carry its burden of showing all of its managers' costs are reasonable, and had not complied with our requirements for affiliate transactions.

While the evidence shows the three managers spend time on non-utility business, there is little evidence in the record on the amount of time they spend on such activities. Thus, it is necessary for us to grant limited rehearing to determine the appropriate disallowance for services Great Oaks provides to its affiliate and for time spent on unregulated activities. As set forth in the ordering paragraphs below, we order Great Oaks to provide sufficient documentation for us to determine the appropriate disallowance for such activities. We note we have previously instructed Great Oaks to account for it affiliate transactions. We put Great Oaks on notice if it fails to provide sufficient evidence to calculate an adjustment for services it provides to its affiliate and for time spent on unregulated activities, we may disallow 100 percent of its three managers' salaries as not supported.

F. Application of Domestic Production Activities Deduction

Great Oaks argues D.10-11-034 incorrectly concluded Great Oaks' rates should be based on taking a DPA Deduction when filing its federal income taxes. Great Oaks asserts D.10-11-034 relied on a flawed interpretation of the tax law, and discusses a number of errors with the Decision's interpretation. (Rehrg. App. pp. 36-39.) Great Oaks' argument has some merit.

Section 199 of the Internal Revenue Service Code ("Int. Rev. Code") allows a deduction equal to nine percent of the lesser of (a) the qualified production activities income ("QPAI") or (b) taxable income (determined without regard to Section 199) for the taxable year. QPAI is calculated using the taxpayer's domestic production gross receipts ("DPGR"). (Int. Rev. Code § 199(c).) DPGR includes gross receipts which are derived from electricity, natural gas, or potable water produced by the taxpayer in the United States. (Int. Rev. Code, § 199(c)(4)(A)(III).) DPGR does not include gross

receipts from the transmission or distribution of potable water. (Int. Rev. Code, § 199(c)(4)(B)(ii).)

D.10-12-034 states that a DPA Deduction is allowed:

> . . . when the taxpayer fulfills conditions specified in Section 199. A water utility is allowed this deduction if its domestic production activities include the acquisition, collection, and storage of raw water (untreated water), transportation of raw water to a water treatment facility, and treatment of raw water at such a facility.

(D.10-11-034, p. 51.)

Great Oaks first contends it is not eligible to take a DPA Deduction because all of the listed activities are deemed to be requirements for a DPA Deduction, and it does not transport water to water treatment facilities or treat water at such a facility. (Rehrg. App., p. 38.) Great Oaks is incorrect.

The language contained in the decision summarizes language from the Internal Revenue Service Final Regulations on the DPA Deduction. The Final Regulations explicitly state that gross receipts from any of the three activities are qualifying income for the DPA Deduction. Specifically, the Final Regulations state:

> In the case of potable water, production activities include the acquisition, collection, and storage of raw water (untreated water), transportation of raw water to a water treatment facility, and treatment of raw water at such a facility. Gross receipts attributable to *any* of these activities are included in DPGR [Domestic Production Gross Receipts] if all other requirements of this section are met.

(71 Fed.Reg. 31268, 31300, italics added.) Therefore, Great Oaks' contention that all the listed activities are required to qualify for a DPA Deduction is incorrect.

Great Oaks next asserts that DRA's witness was not qualified to provide testimony on federal tax law, and thus, the Commission could not accept DRA's position

on how to apply the tax deduction.[32] This is an issue of credibility and how much weight to give a witness. The weighing of evidence is within our discretion. Great Oaks cites to no violation of rule or law, and thus, we need not address this issue further.

Finally, Great Oaks argues that it does not qualify for the DPA Deduction because it does not generate revenues on the water it pumps (produces) from its groundwater wells but derives its revenues from the transmission and distribution of potable water. (Rehrg. App. p. 38). Great Oaks thus contends all of its gross receipts are non-domestic production receipts under the exception in Int.Rev. Code § 199(c)(4)(B)(ii). (Rehrg. App. p. 38.) D.10-11-034 accepted DRA's position that all of Great Oaks' revenues should be considered production of potable water because Great Oaks generates revenue from the sale of potable water only after ratepayers have used the water.[33] (D.10-11-034, p. 52.)

IRS Final Regulations require the taxpayer determine the portion of gross receipts that are DPGR and non-DPGR. (71 Fed.Reg. 31268, 31285.) A taxpayer must "use any reasonable method that is satisfactory to the Secretary based upon all of the facts and circumstances and that accurately identified the gross receipts that constitute DPGR and non-DPGR." (71 Fed.Reg. 31268, 31285.)

The Federal Regulations describe the gross receipts from potable water which do not qualify as DPGR as follows:

> Gross receipts attributable to the storage of potable water after completion of treatment of the potable water, as well as gross receipts attributable to the transmission and distribution of potable water, are non-DPGR.

(71 Fed.Reg. 31268, 31300.)

[32] Great Oaks did not move to strike the DRA witness' testimony.

[33] DRA argued transmission and distribution do not generate revenue if no water is used by the ratepayers, and thus, the way to calculate revenue from qualified production activities for a utility company (such as Great Oaks) with 100 percent pumped water is to determine the total revenue from water sales based on the total production volume of pumped water. (DRA Reply Brief, p. 32.)

The legislative history of the American Jobs Creation Act of 2004 provides further guidance on this issue. Footnote 28 of the Conference Report states:

> … any gross receipts from the storage of potable water after the water treatment facility or delivery of potable water to customers does not give rise to qualifying domestic production gross receipts. The conferees intend that a taxpayer that both produces potable water and distributes potable water will properly allocate gross receipts across qualifying and non-qualifying activities. (H.R. Rep. No. 108-775, 2d Sess., p. 273, fn. 29 (2004).)

Thus, neither Great Oaks nor D.10-12-034 is correct on this issue. The issue is not whether all or none of Great Oaks revenues should be considered domestic production gross receipts but rather what portion of Great Oaks' revenues should be attributed to the production of potable water and considered DPGR and what portion should be attributed to transmission and distribution of potable water and considered non-DPGR

We therefore grant limited rehearing to determine the appropriate allocation of revenues between DPGR and non-DPGR to determine the appropriate DPA Deduction.

G. Motor Vehicle Registration Fee

Great Oaks argues D.10-11-034 incorrectly treated Department of Motor Vehicle ("DMV") fees as expenses rather than as taxes. (Rehrg. App., p. 39.) Great Oaks contends in California a motor vehicle license fee is a tax levied pursuant to California Revenue & Tax Code section 10751, and as a matter of law must be considered a tax. (Rehrg. App., pp. 39-40.)

There is a distinction between tax accounting and ratemaking. While a DMV fee may be considered a tax under California law, it is common practice for the

utility to record these fees as transportation expenses[34] and for the Commission to treat them as expenses for ratemaking purposes. We have consistently maintained "that accounting provisions do not control the ratemaking policies which we may determine to be reasonable and necessary; nor are income tax rules controlling." (*Decision Reducing Test Year Rates and Imposing a Penalty* [D.07-04-046] (2007) ___Cal.P.U.C.3d___, at p. 76 (slip op.))[35] D.10-11-034 properly treated the DMV fees as an expense for ratemaking purposes.

H. County View Tank Capital Addition

Great Oaks contends D.10-11-034 erroneously finds Great Oaks and DRA agreed on capping the costs of the County View Tank at $385,000. (Rehrg. App., p. 41.) Great Oaks also contends that D.10-11-034 erroneously adopts a cost recovery methodology that is contrary to the methodology proposed by DRA which was based on previously adopted Resolution W-4787.[36] Great Oaks states Resolution W-4787 authorized a funding mechanism that implemented a service fee on both existing and future customers but D.10-11-034 authorizes a service fee on only future customers. (Rehrg. App. p. 42.) Great Oaks argues deviating from the Resolution W-4787 cost recovery methodology violated Great Oaks equal protection rights as it is entitled to receive treatment equal other water utilities under the same or similar circumstances. (Rehrg. App., pp. 41, 43.) Great Oaks' claims have no merit.

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[34] Pursuant to the Uniform System of Accounts for Class A Water Companies, vehicle license fees are booked to Account 903, Transportation Expense.

[35] S*ee also Alabama-Tennessee Natural Gas C. v. Federal Power Commission* (5th Cir. 1955) 359 F.2d 318, 336, stating: "The short answer is that accounting for tax purposes and even the [Federal Power Commission's] present Uniform System of Accounts may be valuable tools, but they cannot dictate ratemaking policies," and *Re Post-retirement Benefits Other Than Pension,* [D.92-12-015] (1992) 46 Cal.P.U.C.2d 499, 531 [Conclusion of Law 9], stating: "Regulatory accounting and ratemaking should not be governed by IRS, ERISA, or SEC requirements."

[36] Resolution W-4787 granted a Class D water company the authority to borrow $79,125, under the American Recovery and Reinvestment Act for Safe Drinking Water State Revolving Fund projects and to enter into a secured loan contract with the California Department of Public Health.

The record demonstrates there was an apparent agreement between Great Oaks and DRA on the County View Tank. D.10-11-034 states:

> Both parties agree that Great Oaks may submit this project [the County View Tank], when complete by advice letter and there should be a cap of $385,000. DRA further states that Great Oaks should recover the cost of construction of this tank from future customers through a service fee assessed on future customers when they connect to Great Oaks water service.

(D.10-11-034, pp. 46-47.)

Both Great Oaks and DRA agreed on the need for the project. Great Oaks' justification for capital projects estimates the cost of the project at $385,000.[37] (Ex 1, Vol. 2, Exh. G, pp. 4-5.) DRA recommended the project be capped at $385,000. (Exh. 16, p. 7-11.) On February 17, 2010, the parties submitted a late-filed Joint Comparison Exhibit that provided a summary of litigated items. (Exh. 27.)[38] The Joint Comparison Exhibit did not include the County View Tank as a litigated item.

Thus, the record supports the statement in D.10-11-034 that the parties agreed "Great Oaks may submit this project [the County View Tank], when complete by advice letter and there should be a cap of $385,000."

Moreover, Great Oaks itself previously stated:

> The only remaining issue is the Country View tank. Great Oaks' evidence supports the acceptance of this plant addition, and DRA agrees that such plant addition is supported by proper evidence. [Exhibits 1 and 2, Exhibit (Tab) G, p. 5; Exhibit 16, pp. 7-9 – 7-11] DRA recommended that the Commission approve the Country View tank project under an advice letter to be filed by Great Oaks, with the cost capped at $385,000. [Exhibit 16, p. 7-11] *Great Oaks requests the Commission authorize such an advice letter filing*.

(Great Oaks Opening Brief, p. 63, italics added.)

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[37] Great Oaks calls this a "rough estimate"

[38] Hearings concluded on January 29, 2010.

Great Oaks' argument that requiring it to recover the cost of the County View Tank from future customers violates its equal protection rights also fails. Simply identifying a legal principle or argument, without explaining why it applies in the present circumstances does not meet the requirements of section 1732.[39] Great Oaks' rehearing application presents no analysis of how it is similarly situated to the Class D Water Company that is the subject of Resolution W-4787.

Moreover, the evidence supports our determination that a service fee on future customers is the appropriate funding mechanism. DRA recommended that the Commission allow the company to recover the cost of construction of the County View Tank from future customers through a service fee assessed on future customers. (Exh. 16, p. 7-11.) DRA found future customers will benefit greatly from construction of the tank and it is appropriate for Great Oaks to recover the cost of this improvement from future customers. (Exh. 16, pp. 7-10.)

I. DWA Investigation

Great Oaks contends the DWA Verification Report is flawed because of bad instructions from the ALJ. (Rehrg. App. p. 45.) Great Oaks argues it was unlawful and a violation of due process for D.10-11-034 to impose restrictions and requirements on Great Oaks based on an allegedly flawed Verification Report. (Rehrg. App., p. 45.) Great Oaks further contends it had no opportunity to challenge the imposed restrictions and requirements in the context of this proceeding. (Rehrg. App., p. 44.) Great Oaks argues the Verification Report and all portions of D.10-11-034 based on the Verification Report must be stricken and the decision modified accordingly. Great Oaks' arguments have no merit.

[39] Section 1732 requires applicants for rehearing to specify the ground or grounds upon which they claim a decision is erroneous. (See also, Rule 16.1(c).) Great Oaks has further failed to comply with section 1732 and rule 16.1(c), by not providing any discussion of, or support for, how its right to equal protection under the law was violated. Great Oaks presents its argument broadly and fails to provide any specificity or analysis.

The June 21, 2010, Assigned Commissioner and ALJ Ruling ("Ruling") instructed DWA as follows:

> The Commission's DWA is directed to verify Great Oaks' assertion that the ratepayer provided funds are being held in a separate bank account and that the provisions of the account require approval by the Court for any of these funds to be dispensed to an entity other than the SCVWD. Further, DWA should verify that Great Oaks' accounting entries reflect the utility's assertions that ratepayers are not liable for late payment interest and penalty charges relating to the withheld payments. In reviewing Commission filed reports, we request DWA pay particular attention to the reporting of accumulated interest expense liability on past due payments to SCVWD in Great Oaks' 2009 Annual Report. Finally, DWA should determine whether Great Oaks failure to inform the DRA and the Commission of its actions in withholding the funds from SCVWD violates any GAAP or Commission accounting or reporting requirements.

As described by Great Oaks in previous filings, the Ruling inaccurately summarized Great Oaks' sworn statements on the account's terms and conditions. As Great Oaks has explained, it never asserted the groundwater charge account required approval of the Santa Clara County Superior Court before disbursement of funds to an entity other than SCVWD.[40]

While the instructions the Ruling provided to DWA inaccurately summarized Great Oaks' sworn statements on the account's terms and conditions, it results in no legal error. Great Oaks' Counsel brought this inaccurate description to

[40] As the Decision summarized in footnote 90:

> . . . the actual assertion by Great Oaks' Chief Financial Officer is that she precisely followed the instructions of Great Oaks' CEO to "establish a separate bank account (the 'groundwater charge account') for the purpose of depositing and securely holding, groundwater charges imposed by the Santa Clara Valley Water District until a legal determination is made on the disposition of the funds" and the actual statement by Great Oaks' General Counsel is[:] "Of course, if DRA had conducted an investigation it would also have learned that Great Oaks has deposited all of the disputed groundwater charges into a secure account under instructions that the funds remain in the account until a court of competent jurisdiction, along with the Commission, approve the final disposition of the funds." [Citation omitted.]

DWA's attention shortly after the Ruling was issued and DWA staff explained there was no need to amend the Ruling because the verification report will reflect the nature of the account and provisions.[41] Moreover, the DWA Verification Report did not assert Great Oaks made any such statement. Goal 2 of DWA's Verification Report was: "That Great Oaks' separate bank account has provisions which require approval from Santa Clara County Superior Court for these funds to be dispensed to an entity other than the Santa Clara Valley Water District (SCVWD)." Goal 2 did not state Great Oaks' made such an assertion.

Additionally, the only recommendation the Verification Report made with regard to Goal 2 was that Great Oaks be required to establish specific withdrawal provisions on the account to require the approval of the Santa Clara County Superior Court or the Commission before withdraws to entities other than SCVWD are permitted. (Verification Report, p. 11.) D.10-11-034 made no such order as this issue became moot when Great Oaks informed the Commission it had decided to remit to SCVWD all the payments it had withheld and would continue to make payments to SCVWD when due. (D.10-11-034, p. 66.) Thus the inaccurate instructions did not involve recommendations that were carried forward to the ultimate findings or conclusions in D.10-11-034.

Great Oaks' allegation it had no opportunity to challenge the imposed restrictions and requirements adopted in D.10-11-034 in the context of this proceeding is also incorrect. Great Oaks filed both comments and reply comments on the Verification Report. Great Oaks also filed comments and reply comments on the Proposed Decision and Alternate Decision. Thus Great Oaks had an opportunity to address the restrictions and requirements adopted in D.10-11-034.

[41] See emails between Timothy Guster, General Counsel for Great Oaks and Kayode Kajopaiye of DWA dated July 1, 2010 and included as Attachment A to Great Oaks August 30, 2010 Comments to the DWA Verification Report.

J. Denial of rights under Section 455.2 (c) and D.07-05-062

Great Oaks contends the order in D.10-11-034 requiring it to file its next GRC by application pursuant to the three year rate case cycle schedule unlawfully eliminates its right to request a GRC waiver and its right to file its GRC by advice letter. (Rehrg. App., p. 46.) Great Oaks contends denying it the same rights as granted to other Class A water companies violates its right to equal protection under the law. (Rehrg. App., p. 46.) Again, Great Oaks' claim, it has no merit.

Section 455.2(c) states:

> The commission shall establish a schedule to require every water corporation subject to the rate case plan for water corporations to file an application pursuant to the plan every three years. The plan shall include a provision to allow the filing requirement to be waived upon mutual agreement of the commission and the water corporation.

In *Revised Rate Case Plan Decision* [D.07-05-062], the Commission implemented section 455.2 and adopted procedures which allowed Class A water companies to seek a waiver of the triennial GRC application requirement by letter to the Executive Director.[42] The *Revised Rate Case Plan Decision* also established a procedure pursuant to which a Class A water company may seek to file an advice letter in lieu of an application under certain conditions.[43] Nothing in the *Revised Rate Case Plan Decision* limited the Commission's ability to order a company to file a GRC application, rather than an advice letter.

Class A water companies have no right under Section 455.2 or under *Revised Rate Case Plan Decision* [D.07-10-013] to unilaterally waive the requirement they file a GRC application every three years. As Section 455.2(c) provides a waiver of the triennial rate case application filing requirement is only available "*upon mutual agreement* of the commission and the water corporation." Thus, the Commission has the

[42] *Opinion Adopting revised Rate Case Plan for Class A Water Utilities* [D.07-05-062] (2007) ___Cal. P.U.C.3d___ ,at Appendix A, p. A-14 (slip op.).

discretion to deny Class A water utilities a waiver from the triennial rate case application filing requirement.

Neither section 455.2(c) nor *Revised Rate Case Plan Decision* [D.07-05-062] established a unilateral right for any Class A water utility to obtain a GRC waiver or to file its GRC by advice letter. Even if it had, Great Oaks' equal protection argument would fail. As previously discussed, equal protection rights under the federal and state constitutions are essentially the same and require that the law must afford equal treatment to those who are "similarly situated."[44] Similarly-situated discrimination is lawful if there is a rational basis for the different treatment in the Commission's economic regulation.[45] Here the Commission determined it needed to ensure it carefully reviewed Great Oaks' operations in the next three years under the Rate Case Plan application procedures based on Great Oaks' actions in this proceeding. (D.10-11-034, p. 68.) Great Oaks has not demonstrated this amounts to legal error.

K. Additional Reports

Great Oaks argues the requirements in D.10-11-034 that Great Oaks provide additional reports not required of other Class A water companies violates its equal protection rights. Great Oaks further argues the reporting requirements are vague and ambiguous and violate due process. (Rehrg. App., p. 47.)

Regarding Great Oaks equal protection claim, Great Oaks again fails to comply with section 1732 which requires applicants for rehearing to specify the ground or grounds upon which they claim a decision is erroneous. (See also, Rule 16.1(c).) Here, Great Oaks provide insufficient specificity as to its claim.

(footnote continued from previous page)

[43] *Revised Rate Case Plan Decision* [D.07-05-062], *supra,* Appendix A, Section V.B

[44] U.S. Const., 14th Amend., Cal. Const., art. 1, § 7. *See also Griffiths v. The Superior Court of Los Angeles County* (*Griffiths)* (2002) 96 Cal.App.4th 757, 775-776.

[45] *Griffiths, supra,* 96 Cal.App.4th at p. 776.

Even if Great Oaks had complied with section 1732 requirements, its equal protection claim has no merit. Great Oaks has not established it is similar to all other Class A water companies and, even if it had, there would be no finding of unlawful discrimination because the Commission had a rational basis for requiring the additional reports.[46] D.10-11-034 determined additional oversight of Great Oaks' accounting was necessary. The Commission has broad authority under section 584 to order the furnishing of reports.[47] Under section 792 we can prescribe additional accounting and record-keeping standards which may be necessary to maintain proper regulatory oversight. Based on the DWA's Verification Report, we determined additional oversight of Great Oaks was necessary through additional reporting requirements.

Great Oaks also contends the reporting requirements are vague and ambiguous. Great Oaks argues that "accounting approaches," "accounting treatment," "items," and "relevant procedures and records" are highly ambiguous terms that allow for many different interpretations of what must be reported by Great Oaks. (Rehrg. App., p. 47.)

Ordering Paragraph 13 states:

> Great Oaks Water Company must advise by a letter to the directors of the Division of Water and Audits and the Division of Ratepayer Advocates, with copies sent to the branch chief of the Utility Audit, Finance and Compliance Branch and the service list of this proceeding or its subsequent general rate case, within 60 days when it adopts any new accounting approaches, unusual accounting treatments or items, and changes to relevant procedures and records, especially any event involving a change that represents a difference of 10% or more between the new

[46] *Ibid.*

[47] Section 584 states: "Every public utility shall furnish such reports to the commission at such time and in such form as the commission may require in which the utility shall specifically answer all questions propounded by the commission. The commission may require any public utility to file monthly reports of earnings and expenses, and to file periodical or special reports, or both, concerning any matter about which the commission is authorized by any law to inquire or to keep itself informed, or which it is required to enforce. All reports shall be under oath when required by the commission."

> accounting approach or treatment and the prior accounting approach or treatment.

(D.10-11-034, pp. 81-82 [Ordering Paragraph 13].)

Great Oaks contends it is unclear what "relevant procedures and records" are covered by D.10-11-034. Great Oak asks: "[A]re they those relevant to the system of accounts for Class A water companies or relevant on some other basis?" (Rehrg. App., p 47.) Great Oaks also states it is unclear whether the 10 percent fluctuation is over a month, year, or some other period. (Rehrg. App., p. 47.)

D.10-11-034 ordered the reporting requirement based upon the recommendation in the DWA Verification Report. The verification was performed by the Utility Audit, Finance and Compliance Branch ("UAFCB") of the DWA. The purpose of the verification was to verify how Great Oaks processed and accounted for ratepayer provided pump tax funds. (Verification Report, p. ii.) As part of its verification, the UAFCB considered whether Great Oaks' failure to inform DRA of its action of withholding the pump tax funds from SCVWD violated General Accepted Account Principles or the Commission's accounting or reporting requirements. (Verification Report, p. 3.) As a result of this accounting compliance review, UAFCB recommend the reporting requirement, which the Commission adopted in D.10-11-034.

The Commission need not define each and every change that must be reported but can require the reporting of a category of changes as was the intent here. Moreover, there is no legal issue with the 10 percent change reporting requirements. The percentage change requirement is not restricted to a time period but should be used to determine the impact of a change in accounting methodology. It is the materiality of the change, not necessarily the time period that is being considered.

While Great Oaks has not demonstrated legal error, we modify D.10-11-034 as set forth in the ordering paragraphs to clarify the changes Great Oaks must report are changes to accounting methods.

L. Conservation rates

Great Oaks contends the conservation rates adopted in D.10-11-034 were not the subject of any evidence or hearing and the procedures employed violated due process. (Rehrg. App., p. 49.) Specifically, Great Oaks argues the conservation rates were not based upon the evidence but upon the Commission's independent judgment of how conservation rates should be designed. (Rehrg. App., p. 48.) Great Oaks further contends there was no evidence presented on price signal or rate shock, so the Decision's statement: "A rate differential of 8% between Tiers 1 and 2 and a rate differential between Tiers 2 and 3 of 15% would lessen rate shock for large water uses while still providing a strong price signal in the trial" is not supported by the evidence. (Rehrg. App., p. 49.) Finally, Great Oaks asserts its customers were not notified of the conservation rates adopted in D.10-11-034. (Rehrg. App., p. 49.)

Great Oaks' claim the conservation rates adopted in D.10-11-034 are not based on any evidence or hearings has no merit. DRA sponsored the only conservation rate design proposal. DRA's proposed a rate design which had an 11 percent rate differential between tiers 1 and 2 and a 19 percent rate differential between tiers 2 and 3.

Contrary to Great Oaks' suggestion, the Commission is not limited to adopting or rejecting a DRA's rate design proposal in its entirety. "The Commission has the discretion to exercise its expertise in the regulation of utilities to fashion a rate design . . . based on the varied testimony in the record from different parties." (*Re Alternative Regulatory Frameworks for Local Exchange Carriers* [D.96-02-023], 64 Cal.P.U.C.2d 604, 611.) It has been noted:

> The court has long made it clear that within the regulatory context due process is a flexible concept, permitting expert administrative agencies broad latitude in adapting the specific regulatory needs of their jurisdictions.
>
> . . . .
>
> The Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas. Agencies to whom this legislative power has been delegated are free, within the ambit of their statutory authority, to make

> the pragmatic adjustments which may be called for by particular circumstances. Once a fair hearing has been given, proper findings made and other statutory requirements satisfied, the courts cannot intervene in the absence of a clear showing that the limits of due process have been overstepped. If the Commission's order, as applied to the facts before it and viewed in its entirety, produces no arbitrary result, our inquiry is at an end.

(City of Los Angeles v. Public Utilities Com. (1975) 15 Cal.3d 680, 698 quoting from Federal Power Com. v. Pipeline Co. (1942) 315 U.S. 575, 586.)

D.10-11-034 concluded the rate differential between tiers on DRA's rate design proposal was too high given the limited data. D.10-11-034 reduced the rate differential between tiers 1 and 2 to 8 percent and between tiers 2 and 3 to 15 percent, stating the reduction in the rate differential would lessen rate shock to large users yet still provide a strong price signal during the trial. (D.10-11-034, p. 57.) In making the adjustment to the DRA sponsored rate design, we exercised our expertise to fashion an appropriate rate design by reducing the rate differential. A reduction in the rate differential between tiers will reduce the rate impact on large water users because it will reduce the rates at the higher tiers.

However, we agree that the evidence is lacking to support the statement in D.10-11-034 that the adopted rate design will provide a strong price signal during the trial period. Therefore, we modify the decision accordingly in the ordering paragraphs. (D.10-11-034, p. 57.)

Great Oaks' claim its customers were not noticed of the rate design adopted by D.10-11-034, has no merit. Customer notice requirements are covered by section 454 and Rule 3.2 of our Rules of Practice and Procedure. Section 454 and Rule 3.2 require only notice of the proposed rate change requested by the utility and not necessarily notice of what the Commission will do. (*Order Granting Limited Rehearing of Decision (D.) 01-03-082* [D.02-01-001] (2002) ___Cal.P.U.C.3d___ at p. 21 (slip op.).) Great Oaks' customer notice stated: "[T]he rate increases requested in the Application are intended to cover other increased operating expenses, including significant increases due to

establishment of adoption of requested conservation practices and rates. . . ." (Exh. 1, Exh. D.) Thus Great Oaks' ratepayers had a reasonable expectation, based on the notice provided, that conservation rates were being addressed in this proceeding and that there was a possibility of significant rate increases.

III. CONCLUSION

For the purpose of clarification, we modify D.10-12-001 as discussed above. We grant limited rehearing to determine the appropriate DPA Deduction and to determine the appropriate adjustment for unregulated activities. In all other respects, we deny rehearing of D.10-11-034, as modified, because no legal error has been shown.

THEREFORE, IT IS ORDERED that:

1. Limited rehearing of D.10-11-034 is granted to calculate the appropriate Domestic Production Activities Deduction.

2. Limited rehearing of D.10-11-034 is granted to determine the appropriate disallowance for time spent on unregulated activities and adjustment for services provided to affiliates. Great Oaks shall provide sufficient documentation to determine the appropriate disallowance for such activities

3. On page 37, paragraph 3 is modified to read:

> In rebuttal testimony, Great Oaks asserts that its SCVWD litigation is broader than authorized for memorandum account treatment in Resolution W-4534, issued May 5, 2005 because the case includes an additional cause of action, violation of the California Constitution (Proposition 218). Great Oaks asserts that under the terms of Resolution W-4534, it must wait for all litigation to be complete before booking any expenses and requesting recovery from the Commission, and therefore it is premature for it to make entries into this memorandum account.[57]

4. The first seven paragraphs of the Discussion section starting on page 40 of D.10-11-034 are deleted and replaced by the following:

> We affirm here our earlier finding in Section 4.1 of this decision that Great Oaks' SCVWD litigation expenses are addressed in full in Resolution W-4534, attached to this decision as Appendix C.

The Santa Clara County District Court's Phase One and Phase Two decisions in *Great Oaks Water Co. v. Santa Clara Valley Water District, Case No. 1-05-CV053142 (Amended)*[62] are rendered on the complaint filed November 22, 2005.[63] By amending Case No. 1-05-CV053142, Great Oaks does not change the terms specified in Res. W-4534 for the recovery of litigation expenses, the memorandum cap, or the full flow-through of new benefits received.

When Great Oaks filed Advice Letter 169-W requesting a SCVWD litigation expense memorandum account it did not seek permission to limit the memorandum account to specific causes of action nor did it disclose that its complaint may include causes of action not discussed in the advice letter. If Great Oaks wanted to book litigation expenses associated with some causes of action to the memorandum account but not others, Great Oaks should have made such a disclosure and requested such authorization as issues such as allocation of costs or rebates would need to be addressed. In approving Great Oaks' advice letter, Resolution W-4534 added tariff language stating: "The Company by this tariff has established a Santa Clara Valley Water District Memorandum Account to track the costs related to litigation against the Water District." (Great Oaks tariff sheet Cal. P.U.C. Sheet No. 465-W) While providing a description of the purpose of the litigation, the Resolution did not limit the memorandum account to any particular causes of action.

Great Oaks' SCVWD complaints in subsequent years are also included under the terms and conditions of Resolution W-4534. Great Oaks Advice Letter 169-W did not specifically limit litigation to any particular time period or disclose to the Commission it would be necessary for Great Oaks to file an annual complaint to recover the pump taxes collected for each water year. Moreover, the adopted tariff language does not limit the litigation to a single complaint. (Great Oaks tariff sheet Cal. P.U.C. Sheet No. 465-W.)

Great Oaks' subsequent complaints against SCVWD are based upon the same character of claims and facts. (RT Vol. 3, pp. 291- 292.) It is reasonable to conclude that Resolution W-4534 authorized Great Oaks to book litigation costs associated with the issue of unlawful pump taxes by SCVWD and thus, those costs were not limited to any specific causes of actions or any specific time periods or complaints related to this issue.

Great Oaks own admissions support our conclusion subsequent complaints are sufficiently related to the Lead Case as to be included in the Resolution

W-4534 memorandum account. As noted in Attachment 2 to the Guster Declaration, Great Oaks and SCVWD stipulated and agreed to a continuance of Case No. 1-08-CV119465, to a date determined by the Court which is after March 8, 2011, or until the date final judgment is rendered in the Lead Case, whichever is earlier. The Stipulation and Order Granting Continuance and Staying Case, issued January 21, 2010 by Hon. Kevin J. Murphy, Judge of the Superior Court, in Case No. 1-08-CV119465, references a series of related cases, Case No. 1-07-CV087884, Case No. 1-08-CV123064 and Case No. 1-09-CV146018, and states: "Suffice it to say that there is substantial overlap between the issues in the Lead Case and the issues in the other cases, including this case." (Stipulation, at 1.) This Stipulation and Order further states: "This stipulation shall only become effective if the Court grants the orders attached to each of the stipulations filed in the above referenced actions." (Stipulation at 2.) Each of the two other stipulations and orders staying cases, issued in Case No. 1-08-CV123064 and Case No. 1-09-CV146018, includes identical language noting the substantial overlap between the issues in the Lead Case and in the other referenced cases, and tying the effectiveness of the stipulation to the granting of the orders attached to each of the other stipulations regarding these clearly related cases.

We find that Great Oaks voluntarily entered into a series of stipulations regarding the Lead Case and several related cases, and each stipulation and order explicitly acknowledges the overlapping issues in these cases. Thus, Great Oaks' own conduct supports our conclusion that the subsequent complaints are sufficiently related to be included in the existing Resolution W-4534 Memorandum Account.

The Lead Case and subsequent related cases all address substantially overlapping legal issues, and this Commission has already adopted, at Great Oaks' own request, a memorandum account process, for recording for eventual potential recovery the costs of litigating the issues raised in these cases.

Great Oaks' Resolution W-4534 tariff pages, specifically section F.4.a., clearly provide that any expense eligible for memorandum account treatment must be recorded on a monthly basis. We agree with DRA that Great Oaks' failure to comply with this requirement and properly track its SCVWD litigation expenses means that there is presently no eligible balance in this account.

5. Footnote 63 is modified to read:

As noted in Attachment 1 to the Declaration of Timothy S. Guster, submitted on April 12, 2010 in response to DRA's March 19, 2010 Motion (Guster Declaration), the Santa Clara Superior Court (Court) in Phase 1 of Case No. 1-05-CV053142 (Lead Case), ruled in favor of Plaintiff Great Oaks, finding that SCVWD violated Article XII of the California Constitution as well as the Santa Clara Valley Water District Act. The Court considered all relevant factors, including the overcharges, in arriving at a value for damages due to SCVWD's violations. (See Guster Declaration, Attachment 1 at 2.)

6. D.10-11-034 is modified to add Finding of Fact 27:

Great Oaks initiated complaints against SCVWD that were similar to the Lead Case for subsequent time periods.

7. D.10-11-034 is modified to add Finding of Fact 28:

Great Oaks entered into a series of Stipulations which were filed in the Santa Clara District Court in which Great Oaks agreed there was substantial overlap between the issues in the Lead Case, 1-05-CV-053142, and the issues in Case No. 1-07-CV-087884, Case No. 1-08-CV-119465, Case No. 1-08-CV-123064, and Case No. 1-09-CV-146018.

8. D.10-11-034 is modified to add Finding of Fact 29:

Resolution W-4534 authorized Great Oaks to establish a Santa Clara Valley Water District Memorandum Account to track the costs related to litigation against the water district involving legal challenges to the pump tax. The memorandum account was not limited to specific causes of action or time periods.

9. Conclusion of Law 9 in D.10-11-034 is modified to read:

Resolution W-4534 remains in force for all SCVWD litigation, to include the Lead Case, Case No. 1-05-CV-053142 (amended) and all subsequent related cases, and requires that if Great Oaks is ultimately successful it must immediately file an advice letter to pass through the net benefits to ratepayers.

10. D.10-11-034 is modified to add Conclusion of Law 25:

It is reasonable to conclude Resolution W-4534 authorized Great Oaks to book litigation costs associated with the issue

of unlawful pump taxes by SCVWD and was not limited to specific causes of actions, complaints, or time periods.

11. Ordering Paragraph 13 in D.10-11-034 is modified to read:

> Great Oaks Water Company must advise by a letter to the directors of the Division of Water and Audits and the Division of Ratepayer Advocates, with copies sent to the branch chief of the Utility Audit, Finance and Compliance Branch and the service list of this proceeding or its subsequent general rate case, within 60 days when it adopts any new accounting methodology for recording and reporting transactions that is different from the methodology previously used, including changes to existing accounting procedures and policies, especially any event involving a change that represents a difference of 10 percent or more between the new and prior accounting methodology.

12. Rehearing of D.10-11-034, as modified, is hereby denied as to all issues not addressed in Ordering Paragraphs 1 and 2.

13. This proceeding, Application (A.) 09-09-001 remains open to address the issues subject to the limited rehearing. .

This order is effective today.

Dated October 25, 2012, at Irvine, California.

MICHAEL R. PEEVEY
President
TIMOTHY ALAN SIMON
MICHEL PETER FLORIO
CATHERINE J.K. SANDOVAL
MARK J. FERRON
Commissioners